

COMMONWEALTH OF VIRGINIA
COUNTY OF LOUDOUN
APPLICATION FOR APPEAL
(Please type or Print in Black Ink)

APPLICATION NO. APPL-2010-0003
(Assigned by Staff)

JAN 13 2010

NAME OF THE APPELLANT: Zebra Ventures LLC

NATURE OF THE APPEAL: The Appellant disagrees with the County's December 15, 2009 determination (the "Determination") that a proffer commitment under ZMAP 1998-0003 (the "Rezoning") for a traffic signal at a potential site intersection for the Rezoning property on Waxpool Road has been triggered as a result of a signal warrant study performed by others for an off-site intersection and property unrelated to the Rezoning, and that the Appellant must now install the traffic signal.

DATE OF ORDER, REQUIREMENT, DECISION, DETERMINATION OR NOTICE OF VIOLATION WHICH IS SUBJECT TO THE APPEAL: December 15, 2009

HOW IS THE APPELLANT AN AGGRIEVED PERSON?

The Appellant is named in the Determination as the sole party required to install the traffic signal pursuant to the proffers for the Rezoning.

IF APPEAL RELATES TO A SPECIFIC PROPERTY, PROVIDE THE FOLLOWING INFORMATION:

POSTAL ADDRESS OF PROPERTY: No property identified by the Determination. Appellant's property is undeveloped.

TAX MAP DESCRIPTION: No property identified by the Determination. Appellant is the owner of Tax Map 79 ((84)) Parcel A.

MCPI # (PIN): No property identified by the Determination. Appellant is the owner of PIN: 061-36-2081.

The undersigned has or has not (circle one) the authority to allow and does or does not (circle one) authorize Loudoun County staff representatives on official business to enter on the subject property as necessary to process the application.

Type or print name of Appellant or Agent: Agent for Appellant: Antonio J. Calabrese

Signature of Appellant or Agent:

AJ CALABRESE

Address: Cooley Godward Kronish LLP, 11951 Freedom Drive, Reston, VA 20190

Telephone No.

Home

Work: (703) 456-8650

DO NOT WRITE IN THIS SPACE

Subdivision Name: MCL/NOVA CAMPUS

Total Area (Acres/Square Feet): 71.08

Present Zoning: PDOP

Applicable Ordinance: _____

Election District: Dulles

Date application received: 1/13/2010

Application Fee Paid: \$ 350.00

Date application accepted: 1/14/2010

Receipt No.: 109695422



Antonio J. Calabrese
(703) 456-8650
acalabrese@cooley.com

BY HAND DELIVERY

January 13, 2010

The Honorable Scott K. York, Chairman
Loudoun County Board of Supervisors
1 Harrison St., S.E., 5th Floor
Leesburg, Virginia 20177

Dan Schardein, Zoning Administrator
Department of Building and Development
1 Harrison St., S.E., 3rd Floor
Leesburg, Virginia 20177

**RE: Appeal of Proffer Determination
Zebra Ventures, LLC ("Appellant")**

Gentlemen:

Enclosed are two complete copies of the above-referenced Appeal application to the Board of Supervisors. The application includes an Application for Appeal signed by the Appellant's Agent, the December 15, 2009 proffer determination which is the subject of the Appeal, the Appellant's statement describing the grounds for the Appeal and how the Appellant is an aggrieved party, supporting documents to be included in the record, and the application fee check in the amount of \$350 made payable to the County of Loudoun. We reserve the right to submit additional materials in support of the Appeal.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions.

Very truly yours,

Cooley Godward Kronish LLP

A handwritten signature in dark ink, appearing to read "AJ Calabrese".

Antonio J. Calabrese

Enclosures

cc: Lamot J. du Pont, Zebra Ventures, LLC

428005 v1/RE

**Appeal Of The Loudoun County Proffer Auditor's Determination
Concerning Installation of Traffic Signalization
Along Route 625 (Waxpool Road)**

I. Statement of the Case

Pursuant to Section 15.2-2301 of the Virginia Code and Section 6-1209(J) of the Loudoun County Zoning Ordinance, Zebra Ventures LLC ("Zebra") submits this appeal of the December 15, 2009 determination by the Loudoun County Department of Building and Development Proffer Auditor (the "Determination," annexed hereto as Exhibit A). The Determination requires Zebra to install a traffic signal at Route 625/Waxpool Road, adjacent to the location identified as Site Entrance M on the proffer statement dated June 17, 1998 for WorldCom, ZMAP 1998-0003 (the "Proffer Statement," annexed hereto as Exhibit B).

II. Introduction

On June 17, 1998, Zebra's predecessor in interest submitted the Proffer Statement for its planned development of the WorldCom headquarters and surrounding parcels (the "Property"). At the time the then-owner of the Property did not have a clear plan as to how the entire Property would be developed, other than the core area comprising the former WorldCom headquarters. Consequently, the owner's plans identified several potential entrances to the site that the owner considered constructing in the future. The owner had no obligation to construct any of the site entrances, and it was understood that under no circumstances would all of the potential site entrances be constructed.

The Proffer Statement contained commitments to mitigate the land use impact of the development of the Property, including Zebra's agreement to install a traffic signal at some of the potential site entrances if warranted by an appropriate traffic signal study. One of these potential site entrances was denoted Site Entrance M, located on the northern edge of the Property, which is bounded by Waxpool Road. Site Entrance M has never been opened and

Zebra's property near Site Entrance M is vacant. Nonetheless, on the other (north) side of Waxpool Road sits the Waxpool Road Center, a hotel and restaurant complex that is not owned by Zebra. Amazingly, the Determination concludes that even though Site Entrance M has never been used, Zebra, as the owner of *vacant* land on the south side of Waxpool Road, must pay for a signal at the intersection of Waxpool Road and the Waxpool Center on the north side of Waxpool Road, thus forcing Zebra to bear the costs of mitigating impacts created by someone else's development. This Determination misconstrues the Proffer Statement's plain language, ignores its intended purpose, and creates troubling implications for the entire system of voluntary proffers. For these reasons and as more particularly set forth herein, the Proffer Auditor's Determination must be reversed.

III. The Appellant Is Harmed By The Zoning Auditor's Determination And Is A Party Aggrieved

Zebra is the current owner of property indentified on the Loudoun County Parcel Maps as Parcel Identification Number 061-36-2081 ("the Parcel"). The Parcel is bounded by State Route 625/Waxpool Road to the north, State Route 607/Loudoun County Parkway to the south and east, and the former WorldCom headquarters complex to the west. The Parcel is located within the Property that was subject to the zoning map amendment for WorldCom, ZMAP 1998-0003, filed by UUNet Technologies. The Board of Supervisors approved ZMAP 1998-0003 on June 17, 1998, subject to the Proffer Statement and to the concept development plan dated April 24, 1998 and revised through June 5, 1998 by Dewberry and Davis (the "Concept Development Plan," annexed hereto as Exhibit C). For purposes of this appeal and with respect to the Parcel, Zebra is the successor in interest to UUNet Technologies.

Proffers II(D)(1)-(2) and V(D) require UUNet Technologies or its successors in interest to pay for the costs of traffic signals at several potential intersections whenever such traffic

signals are warranted by VDOT criteria. The Proffer Statement and Concept Development Plan identify one such potential intersection at Route 625 and Site Entrance M, a spot along the northern border of the Property, fronting the south side of Waxpool Road. VDOT has determined that a traffic signal is warranted at the intersection of Waxpool Road Center and Waxpool Road, a location outside of the Property on the north side of Waxpool Road opposite the proposed Site Entrance M. Based on these facts, the Determination requires Zebra to install, at its own cost, a traffic signal at Waxpool Road to serve that intersection.

The Board of Supervisors has jurisdiction to hear Zebra's appeal because the Determination constitutes a decision of the Proffer Auditor, acting on behalf of the Zoning Administrator, regarding the proffered conditions associated with the zoning map amendment. Zebra is aggrieved because the Determination requires Zebra to take actions that fall outside the terms of the Proffer Statement and to mitigate traffic impacts wholly unrelated to the development of Zebra's Property. However, because this appeal will determine whether Zebra or the County must pay for the traffic signal at issue, Zebra respectfully suggests that the Board may not be sufficiently free of pecuniary bias to render a fair and impartial decision that comports with Zebra's Due Process rights under the United States Constitution. *See, e.g., Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) ("It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes."). Zebra reserves its right to raise this Due Process Claim with the Circuit Court, pursuant to Va. Code 15.2-2314.

A. Nothing in the Proffer Statement Requires the Owner to Build A Traffic Signal

1. Standard of Interpretation for Voluntary Proffers

Proffers are voluntary commitments made by landowners to ameliorate the impact of *their own development* on the local infrastructure and adjoining land. *Hale v. Board of Zoning Appeals*, 227 Va. 250, 273 (2009). Proffers are to be interpreted according the plain meaning of their language. *Hale*, 227 Va. at 274; *see also Gwinn v. Walker*, No. 182748, 2003 WL 21787530, at *3 n.13 (Fairfax County Cir. Ct. July 22, 2003) (applying dictionary definition to interpret proffer term). Once accepted, proffers have the force of law equal to zoning ordinances. As such, proffers must be strictly construed in favor of the property owner. *See Ramsey v. Board of Zoning Appeals*, No. 04-346, 2005 WL 3579040, at *2 (Warren County Cir. Ct. June 8, 2005) (zoning ordinances to be strictly construed in favor of property owner). In addition, the Proffer Statement itself requires strict interpretation of its terms: the Proffer Statement disclaims liability for any improvements “except to the extent *expressly required* by these Proffers....” Proffer Statement at 5 (emphasis added).

2. There Is No Intersection At Waxpool Road and Site Entrance M

In strictly construing the plain language of Proffer Statement, it is clear that Zebra has no obligation to pay for a traffic signal at the “intersection” of Waxpool Road and Site Entrance M because there is no “intersection” at that location. Proffer II(D) states as follows:

D. SIGNALIZATION

(1) Proffered Signals. The Owner shall install signalization at such time as warranted by VDOT criteria (i.e. the Manual on Uniform Traffic-Control Devices) *at the intersections of:*

...

(d) Route 625/Site Entrances M-N

...

(2) If at the time the necessary warrants for any of the foregoing traffic signals are met WorldCom or a wholly-owned subsidiary is the owner of all land *fronting on the intersection* where the signal

is warranted, WorldCom shall be responsible for paying for the cost of such signal. The Protective Covenants, to be established by the Owner at the time of sale of any land within the Property to an entity unrelated to WorldCom, shall provide for a procedure and formula for the collection and payment of future signalization costs from such unrelated entities.

Proffer Statement at 7-8 (emphasis added).

This Proffer requires the owner to install a traffic signal only at certain *intersections*. An intersection is “[a] place where things, as streets, intersect.” *Webster’s II New Collegiate Dictionary* 580 (1999). An intersection at Site Entrance M would consist of (1) Waxpool Road as the major approach road and (2) a minor approach road starting at Site Entrance M and leading southward into the Property. However, there is no minor approach road at Site Entrance M.¹ The Parcel is vacant, and a permanent traffic barrier stands at Site Entrance M.

As employed by the Proffer Statement, the terms and concepts “Site Entrance” and “Intersection” have distinct meanings. The Proffer Statement defines “Site Entrances” as “site access points to public roadways (Route 625, Route 640 and Route 607) adjacent to the property.” These potential Site Entrances are marked by arrowpoints on the Concept Development Plan. These arrowpoints are all located within the Property and mark the locations of *unbuilt* roads within the Property that may form *future* intersections. The Proffer Statement makes it clear that Site Entrances, alone, are not intersections: Proffer II(D)(1) calls for traffic signals “*at the intersection of*” Waxpool Road and Site Entrance M, not merely at Site Entrance M or even along Waxpool Road at Site Entrance M.

¹ This definition of “intersection” is used by the traffic signal study that VDOT relied upon to warrant the traffic signal at issue. This traffic signal study describes the intersection requiring the traffic signal as Waxpool Road forming the main approach and the Waxpool Road Center Main Entrance, which runs northward into the Waxpool Road Center property, forming the minor approach. Gorove/Slade Assocs., Inc., *Existing and Future Conditions at Waxpool Road and Waxpool Road Center Western (Main) Entrance* 15 (June 18, 2008, rev. Feb. 23, 2009) (annexed hereto as Exhibit E).

In contrast, when the Proffer Statement uses the term “intersection,” it refers to the meeting place of two actual roads. For example, the Proffer Statement includes certain improvements for the “intersection of Panorama Parkway at Route 625.” This is an actual crossing of two actual roads, Panorama Parkway and Waxpool Road; it is not, like Site Entrance M, merely a spot on a map along Waxpool Road.

Finally, the Proffer Statement addresses the possibility that there may never be an intersection at a designed Site Entrance. On page 5, the Proffer Statement explicitly states that the internal road network and Site Entrances shown on the Concept Development Plan may be modified to accommodate final site engineering and VDOT and local approval. On page 6, the Proffer Statement covenants to “open up site entrances ‘A’ and ‘B’” – that is, to build intersections at those two Site Entrances – only if certain conditions occur. If those conditions fail to occur, there will be no intersections at Site Entrances A and B, just as there is currently no intersection at Site Entrance M.

VDOT has also recognized that not every Site Entrance will become an intersection with a traffic signal. In 1998, VDOT reviewed WorldCom ZMAP 1998-0003. In a letter dated June 16, 1998, a VDOT transportation engineer wrote “It is not anticipated that all crossovers will be signalized on Loudoun Parkway and Waxpool/Farmwell Road.” *See* Exhibit D (letter from Kevin Nelson to Charles Yudd (June 16, 1998)).

The law requires the Board to apply a narrow reading of the plain text of the Proffer in question. Such a reading requires the existence of an intersection on the south side of Waxpool Road formed by a road starting at Site Entrance M and running southward into the Property before Zebra is obligated to pay for a traffic signal there. There is no such road or intersection. Zebra should not be forced to pay for a traffic signal at this nonexistent intersection.

B. Zebra Cannot Be Forced to Pay For Mitigation of Traffic Created By Others' Development

The lack of an intersection on the Property at Site Entrance M is enough to overturn the Determination. In a further attempt to force Zebra to pay for a traffic signal, however, the Zoning Administrator may cite the traffic entering and exiting Waxpool Road at Waxpool Road Center. This traffic, however, does not arise from the Property, does not lead into the Property, and does not fall within the contemplation of Proffer Statement. As such, the County cannot require Zebra to pay for a signal intended to address this traffic.

1. Unrelated Development by An Adjacent Landowner Has Created the Need for Traffic Signal

The Waxpool Road Center has built a road on its own property identified by VDOT as the "Waxpool Road Center Main Entrance." This entrance intersects with Waxpool Road at a point north of Site Entrance M. According to the traffic signal study VDOT relied upon to decide a signal was warranted, the need for a traffic signal arises entirely from vehicles entering and leaving Waxpool Road Center:

[T]raffic volume along Waxpool Road is not the deciding factor for the signal warrant study. The traffic volume produced by the Waxpool Road Center is the 'key' factor in triggering the need for a traffic signal.

Exhibit E at 5.

While Proffer II(D)(2) requires the owner of the property "fronting on the intersection where the signal is warranted" to pay for that signal, Zebra is *not* that owner. The intersection warranting a signal fronts the *north* side of Waxpool Road. Zebra owns the property fronting the *south* side of Waxpool Road. This is clear from a comparison of the 2009 traffic signal study at Exhibit E with a traffic report submitted with ZMAP 1998-0003, annexed hereto at Exhibit F.

Below, on the left, the intersection diagram submitted with ZMAP 1998-0003 shows the planned but unbuilt intersection at Site Entrance M and Waxpool Road. Below, on the right, the intersection diagram from 2009 shows the actual traffic flow in the area today. This later diagram highlights both the absence of any intersection at Waxpool Road and Site Entrance M and the fact that the traffic warranting a signal originates from a source wholly unrelated to the Property.

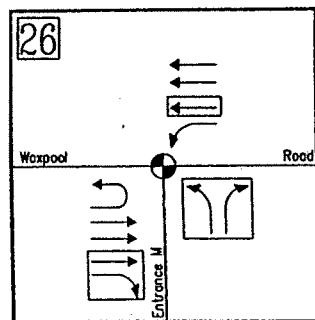


Exhibit F, Fig.3

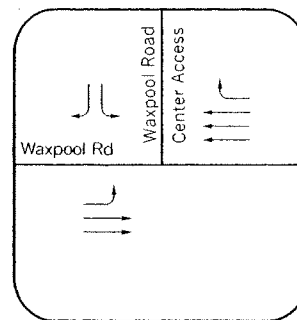


Exhibit E at 4

2. **Zebra Has No Obligation to Mitigate Traffic Created by Adjacent Landowners**

At two points, the Proffer Statement expressly contemplates measures related to development by third parties. Neither relate to the development at Waxpool Road Center. Because proffer statements are to be construed strictly in the landowner's favor, the County cannot read into the Proffer Statements additional obligations arising from third-party development at Waxpool Road Center. *Hale*, 277 Va. at 274.

In any case, the Proffer Statement's two provisions related to third-party development show the owner intended to pay only for mitigation of traffic directly related to its own Development.

First, and most notably, at Proffer II(D)(1)(e), the owner agreed to pay only half the cost of a traffic signal at the intersection of Waxpool Road and Site Entrance L if the landowner on

the north side of Waxpool Road constructed a street opposite from Site Entrance L. In other words, if half the traffic at an intersection consisted of vehicles entering or leaving another landowner's property, this Proffer requires the owner to pay for only half of the related traffic improvements. Under this same principle, since none of the traffic in the area of Site Entrance M and Waxpool Road is attributable to the Property, the owner should not be responsible for the cost of mitigating any of it.

Second, at Proffer II(B)(e), the owner agreed to realign Waxpool Road from Site Entrance C to Farmwell Road at Switch Road if the adjacent Islamic Saudi Academy had not already begun to do so by December 31, 2000. However, this Proffer makes clear that once the Islamic Saudi Academy made its cash in lieu contribution to Loudoun County under the conditions of its Special Exception Application, the owner expected to be reimbursed for the cost of realigning the road. Again, this Proffer shows that the owner intended to pay only for the cost of traffic improvements directly related to its own Property. For any improvements necessitated by a third party's development, the owner expected to be paid back.

Thus, in all respects the proffers and applicable law make it clear that Zebra is not obligated to bear the costs of mitigating impacts caused by development of others' property. Zebra cannot be forced to pay for the traffic signal at issue.

IV. Conclusion

For the foregoing reasons, Zebra requests that the Determination be reversed.

ZEBRA VENTURES LLC
By Counsel

COOLEY GODWARD KRONISH LLP
11951 Freedom Drive
Reston, Virginia 20190
Telephone: (703) 456-8000
Facsimile: (703) 456-8100

By: AS CALABRESE
Antonio Calabrese

EXHIBIT INDEX

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